

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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ROBERT L. DYKES #201541,

Plaintiff,

v.

File No. 1:14-cv-01167

N. MARSHALL, ET AL.,

Defendants.

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Trial - Volume 2

Before

THE HONORABLE RAY KENT  
United States Magistrate Judge  
August 23, 2018

APPEARANCES

In Pro Per: Robert L. Dykes-Bey #201541  
Oaks (MSP)  
Oaks Correctional Facility  
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Manistee, MI 49660

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None

1 Grand Rapids, Michigan

2 Thursday, August 23, 2018 - 9:09 a.m.

3 THE COURT: Good morning.

4 MR. DYKES-BEY: Good morning.

5 MR. DEAN: Good morning.

6 THE COURT: Everybody manage to get some sleep  
7 last night? I didn't, but hopefully you guys did, so --  
8 but I never do.

9 All right, so Stef tells me we're all set to go.  
10 I'll bring -- we'll bring the jury in, I'll tell them we're  
11 going to have -- hear final argument from each side, and  
12 then let you gentlemen go.

13 Did I set anything about time limit on --

14 MR. DYKES-BEY: No.

15 THE COURT: -- final -- okay. So Mr. Dykes-Bey,  
16 give me -- give me just a ballpark estimate of how long you  
17 think you may go.

18 MR. DYKES-BEY: I don't know, maybe 20 minutes,  
19 maybe.

20 THE COURT: Oh, that's fine. No worries. I was  
21 afraid you were going to say like two and a half hours or  
22 something.

23 MR. DYKES-BEY: No.

24 THE COURT: Then we were going to have a  
25 problem.

1 MR. DYKES-BEY: No.

2 THE COURT: Twenty minutes, 30 minutes, you  
3 know, anything, you know, under 40 minutes --

4 MR. DYKES-BEY: Yeah, I won't, no.

5 THE COURT: Please, God, under 40 minutes,  
6 but --

7 MR. DYKES-BEY: I don't want to bore people,  
8 yeah.

9 THE COURT: Okay, all right. It's wise. You  
10 know, people have limited attention spans. Okay, well,  
11 anything else we should talk about? Mr. Dykes-Bey?

12 MR. DYKES-BEY: No. No, sir.

13 THE COURT: Okay. Mr. Dean?

14 MR. DEAN: No, your Honor.

15 THE COURT: All right, we'll get the jury.

16 (At 9:12 a.m., jurors enter courtroom.)

17 THE COURT: Good morning.

18 THE JURORS: Good morning.

19 THE COURT: I asked Mr. Dykes-Bey and Mr. Dean  
20 and Mrs. Kerr whether they managed to get any sleep last  
21 night. How about you folks? Everybody get some shuteye?

22 THE JURORS: Yes.

23 THE COURT: Ready to go?

24 THE JURORS: (No verbal response.)

25 THE COURT: Well, we're in the home stretch now,

1 so momentarily I'll have Mr. Dykes-Bey and Mr. Dean come up  
2 and do their closing arguments. As I said yesterday,  
3 Mr. Dykes-Bey will go first, Mr. Dean will go second, and  
4 then Mr. Dykes-Bey has a chance to make a rebuttal  
5 argument, if he chooses to. Then I'm going to read you the  
6 instructions. You know, I apologize in advance, they're,  
7 you know, kind of long, and I'm sure they're not the most  
8 exciting thing you've ever heard. But they are important,  
9 so please listen carefully as I give them to you, because  
10 they'll structure what you do when you go back to the jury  
11 room. And then it's in your hands, and we'll be out here  
12 waiting patiently and somewhat anxiously, I'm sure, for  
13 your results.

14 So Mr. Dykes-Bey, closing argument.

15 MR. DYKES-BEY: Oh, yes, sir.

16 I'd like the jury to know that I understand that  
17 this is a lengthy process and that the fate, you know, lies  
18 with you. I have the biggest burden, you know, between the  
19 two, and I must admit, while it appear to be simple, it's  
20 not. But I'm confident that after you review the evidence  
21 you'll find that there's enough evidence to establish each  
22 element of my claim.

23 As to the first claim, absent of any testimony  
24 that you heard yesterday, just the evidence, I'm confident  
25 that you will find that the evidence shows that I was

1 engaged in federally protected conduct when I filed the  
2 legitimate grievances against food service staff, who were,  
3 according to the evidence, retaliating against me in their  
4 efforts to have me terminated from my job assignment.  
5 Again, you will review independently that evidence.

6 As to the second prong, absent of any testimony  
7 that you heard yesterday, the evidence shows that the  
8 defendant took an adverse action against me when she  
9 falsified the program classification report by asserting  
10 that I had received a misconduct on the job. No, I did  
11 not. While the evidence shows that the defendant changed  
12 her reasons for termination a few times, none of that means  
13 anything, because none of those reasons is what got me  
14 terminated. What got me terminated was the false claim  
15 that I had received a misconduct on the job. That's what  
16 got me terminated.

17 I don't want the jury to be, you know,  
18 misdirected, you know, and going down this rabbit hole  
19 about these other claims that were created to make me look  
20 bad. What's on that classification report is what got me  
21 terminated from my job. So that is the adverse action.

22 I will go on to the third prong. As to the  
23 third prong, the adverse action was taken on behalf of her  
24 coworkers as it is the classification director -- the  
25 classification director is the really the head of all the

1 supervisors. They all have to go to the classification  
2 director to have somebody terminated from their job.

3 The food service staff were trying to terminate  
4 me, which the evidence will show were false claims and  
5 misconducts, but they failed in their attempts. But it was  
6 the fabrication of food service North that the defendant  
7 now claims, yesterday, according to her testimony, was her  
8 reason for termination, the only supervisor she testified  
9 yesterday to knowing. Coincidence, or an unintentional  
10 fact discovery during trial yesterday?

11 So I would like to ask you just to, you know,  
12 allow the evidence to speak to you. You know, testimony is  
13 fine, but I believe that the evidence is more solid than  
14 anything that a person have to say. And I rest with that.  
15 Thank you.

16 THE COURT: All right, Mr. Dykes-Bey. Thank  
17 you. Mr. Dean?

18 MR. DEAN: Good morning. Once again I want to  
19 thank you for your time, and I'm glad this trial ended up  
20 being fairly short. But there's a couple of key points  
21 that need to be brought out here in terms of this  
22 retaliation claim. First, the only element that's really  
23 at issue here is the third element. Was the firing from  
24 his work assignment causally connected to the grievances  
25 that Mr. Dykes-Bey wrote against food service staff.

1           There's been absolutely no documentary evidence presented  
2           by plaintiff that there's a connection, and the only  
3           testimony that he gave was that she was working on behalf  
4           of her long-time coworkers.

5                       Now, I will admit, Mr. Dykes-Bey sounds very  
6           convincing. He's absolutely certain he's right, until he's  
7           presented with facts that shows he wrong, and then he  
8           blithely continues on. He insisted that the connection  
9           between Ms. Kerr and Stephen Jones was that they worked  
10          together for a long time at Riverside Correctional  
11          Facility. You remember he testified to that. I even asked  
12          him on cross-examination, "Are you sure that these two knew  
13          each other from Riverside?" "Yup. Absolutely sure." And  
14          when Nancy got up on the stand, you heard her testify, she  
15          never worked at Riverside. There is absolutely no  
16          connection between her and Officer Jones. They work in  
17          different parts of the building, there's no ongoing  
18          communication between the two. Nancy even said he could  
19          have passed by her on the street and she wouldn't even know  
20          who he is. There's no connection that she was assisting  
21          these other officers in his claim that they were  
22          retaliating against him.

23                      In terms of director, food service director  
24          North, she said she met him one time at a -- at a manager's  
25          meeting, and that's the only connection she had with this



1 individual. The people that he really wants to sue are  
2 Officer Jones and Meadows and North, but they're not here,  
3 so he has to connect this retaliation claim to somebody who  
4 had nothing to do with anything, other than taking their  
5 reports and saying, "We've got to get this guy out of the  
6 cafeteria."

7 And I thought the most interesting exchange  
8 yesterday was during cross-examination of Mr. Dykes-Bey,  
9 and we went through this long back-and-forth about what  
10 constitutes a legal agreement between two prisoners. He  
11 said he is very legally savvy, that he does a lot of legal  
12 work for other prisoners, and yet he tried to characterize  
13 this agreement with him and prisoner Johnson as Johnson was  
14 just reaching out to him, and out of the goodness of his  
15 heart and giving him coffee bags. But if you look at the  
16 exhibit, that note that Mr. Dykes-Bey does not deny that he  
17 gave and tried to pass on to this prisoner, it's very  
18 specific that there was an agreement for work he did for  
19 the prosecutor for this other prisoner. And if you look at  
20 it, this wasn't an agreement out of the goodness of  
21 Johnson's heart. He was telling him emphatically, "I need  
22 that coffee ASAP. I looked out for you, now you've got to  
23 look out for me." And he gave explicit instructions of how  
24 he wanted this hand-off to happen in the food service area.

25 And you saw the exhibit that talked about the

1 lay-in notice. There was a real concern on the part of  
2 prison officials that there was a legal agreement, against  
3 the rules, which Mr. Dykes-Bey admitted, and that this  
4 agreement could constitute extortion between one prisoner  
5 and another. You heard Nancy Kerr testify that, look, it's  
6 a problem to have these people have these agreements  
7 outside of the scope of the MDOC because of the potential  
8 for harm that could result. If somebody doesn't pay up, he  
9 can get somebody to attack this prisoner, or they have a  
10 disagreement and it ends up being a fight that draws in  
11 either corrections officers or other prisoners. There's a  
12 very real reason to get him out of the cafeteria.

13 But the problem is is that Mr. Dykes-Bey doesn't  
14 want to be held accountable for his own actions and  
15 wrongdoing that started all this. Instead, he wants to  
16 shift the blame on everyone else and say, "You didn't  
17 follow procedure. Look at this policy directive. You  
18 didn't give me a 30 day conditional notice, and you can't  
19 fire me." But he's got it all wrong. The safety and  
20 security of the institution is paramount. He could -- they  
21 could break every policy directive that they set up all day  
22 long and it's not a Constitutional violation because he  
23 doesn't have a Constitutional right to a job in the prison.  
24 What he has is the Constitutional right not to be  
25 retaliated against. And there's no connection.

1                   There's this thing I like to call the Scooby-Doo  
2                   confession. It's when a prisoner has no other connection  
3                   between the officer that he's accusing of retaliation and  
4                   the act that he claims was his grievances that he was  
5                   retaliated against, he magically has a conversation with  
6                   the defendant in which the defendant says, "I know all  
7                   about your grievances, and we're going to take care of you  
8                   by terminating you from the job."

9                   In the Scooby-Doo cartoons every Saturday  
10                  morning they would investigate a crime, and at the end of  
11                  the episode, the bad guy would always say, "Yup, I did it,  
12                  and darn it, I would have gotten away with it if it weren't  
13                  for you meddling kids." But I always wondered as a kid,  
14                  why would the villain just spill his guts and tell them  
15                  that, "Yes, I'm retaliating against you because of this."  
16                  Well, the truth is, and this is common sense, nobody talks  
17                  like that. Nancy Kerr was working in a different part of  
18                  the prison and had no daily connection with the officers  
19                  that he really wants to sue. Let's be honest here, he  
20                  wants to go after North and he wants to smear Officer Jones  
21                  and Meadows and blame them that they had a planned  
22                  retaliation, but the only person left here is Nancy Kerr.  
23                  So to get that connection, he had to say he heard her say  
24                  to him, "Well, I'm doing this because of all these  
25                  grievances you wrote." But why? These grievances never

1           impacted her job. They weren't even grievances against  
2           her. They were against someone else. Mr. Dykes-Bey  
3           couldn't show that any of his grievances resulted in  
4           terminations for any of these other officers, so why would  
5           she need to protect them? She has the entire prison and  
6           every employee and prison employee that she's working on  
7           making assignments. Why would she care about stopping a  
8           couple of grievances against officers that she doesn't even  
9           really work with on a day-to-day basis? And remember,  
10          that's literally the only connection between these other  
11          officers and Nancy Kerr, was he claims that she was  
12          furthering their conspiracy to retaliate against him.

13                 The bottom line is, after the first three  
14          elements of this retaliation claim, if he could even  
15          establish that there was some connection, then the onus  
16          comes on the defendant the burden to prove that she would  
17          have taken the same action anyway. And if you'll recall in  
18          Exhibit number 12, this was the e-mails, it's in the  
19          exhibit book, the e-mails between Barb Slovisky and Nancy  
20          Kerr. Barb Slovisky was somebody working in the central  
21          office. She sent an e-mail to Nancy wanting to know the  
22          circumstances of the termination. And all she was worried  
23          about was the 363s and the 175s, that they weren't there in  
24          the paperwork.

25                 Well, having worked in state government for the

1 last ten years, I can say that is spoken like a true  
2 bureaucrat. Barb Slovisky did not accuse Nancy Kerr of  
3 lying. All she was concerned about was this piece of  
4 paperwork and that piece of paperwork wasn't in there, so  
5 she didn't understand why he was terminated. Read that  
6 e-mail, and read the e-mail exchange and responses from  
7 Nancy. She explains exactly why she had to let  
8 Mr. Dykes-Bey go, and there was no implication on the part  
9 of Barb Slovisky that she didn't believe her. In fact she  
10 said, "Yeah, I'm sure he did do everything that was  
11 contained in there. I just need the 363s and the 175s."

12 Not following the bureaucratic procedure of  
13 every piece of paperwork does not mean that the person had  
14 a motivation to lie. In fact, as she put everything, she  
15 explained what she did with that report. She stapled it  
16 with the lay-in notice and the memorandum that he was being  
17 on unemployable status, and it was stapled together. That  
18 little box on that form only contained so much room.

19 He keeps mentioning the misconduct that's  
20 typewritten on there, but Nancy already explained to the  
21 jury, and she explained in the e-mail to Barb Slovisky,  
22 that that was from a previous facility. That line that's  
23 typewritten on Exhibit 12 is not the reason why he was let  
24 go. It was because of the fact that he had a legal  
25 agreement with another prisoner and is trying to sneak

1 behind everyone's back to get this payment back and forth.  
2 These legal agreements are dangerous, and if you look at  
3 the note, of course the note isn't going to say "pay me or  
4 else," but the implication is obviously there. He said,  
5 "Pay me as soon as possible. I looked after you, now  
6 you've got to look after me." In the prison world, he's  
7 not going to put his name to an actual explicit threat.  
8 He's going to say something like that was in the note to  
9 remind this prisoner that you have a debt to me, and I  
10 expect you to pay it back. And in prison where you have  
11 people that are aggressively violent, that's the type of  
12 thing that needs to be stopped by the MDOC to protect their  
13 officers and other prisoners.

14 I told you yesterday at the end of the day  
15 you're going to use your common sense, and the biggest  
16 question, and I'm almost done here, and this is the last  
17 time I have to speak to you, and in a moment when  
18 Mr. Dykes-Bey gets up here he'll have a couple minutes to  
19 rebut, but I would ask that he needs to answer that  
20 question. What was the motivation on Nancy Kerr's part to  
21 falsify a report to get him fired when she had all the  
22 reason in the world to let him go because of the note they  
23 intercepted? Why would she need to go through all the  
24 subterfuge in order to protect him from filing or retaliate  
25 for filing grievances against officers she doesn't even

1 work with. That's the question that he needs to answer,  
2 and I don't think that he can, other than his claim that  
3 she told him, "I know about your grievances." That's no  
4 connection at all.

5 She did her job to get him out of the kitchen  
6 because he was running an enterprise that could have gotten  
7 people hurt. Thank you.

8 THE COURT: All right, Mr. Dean, thank you.

9 Mr. Dykes-Bey, rebuttal?

10 MR. DYKES-BEY: Yeah. Yes. Yes, sir, thank  
11 you.

12 Well, you know, that does sound, you know,  
13 pretty decent. The fact of the matter remains, a crafty  
14 explanation as to what another person is doing. If you  
15 believe that, then surely you would assert that according  
16 to the due process -- no, hey, I've got to say this to the  
17 jury. No matter what or how crafty the MDOC get, a  
18 prisoner still has a due process. Whether a person want to  
19 believe it or not, and a lot of people don't. They believe  
20 you give up your rights once you come to prison, but that's  
21 not true. A person is still entitled to a due process.  
22 And if you're doing something right, you don't make two or  
23 three different versions of a story as you go along, you  
24 make two, three different versions. If what you believe is  
25 true, then you assert that on the hearing report. That's

1           what that is, an administrative hearing. You assert that  
2           on there as your reason. You don't later on say, well, I  
3           terminated this man because of this and then you come up  
4           with this colorful explanation how somebody could get hurt  
5           and all. Hey, man, that's all backwash stuff. That stuff  
6           is not true. It's all colored to make this individual such  
7           as myself look bad as if, you know, this is something that  
8           I'm actually doing. If that was your reason for  
9           termination, and you believed that, then you should have  
10          put it on there. But that was not on there.

11                   And this hypothetical explanation that somehow  
12          somebody else asserted the false claim about the  
13          misconduct, the classification director is the sole  
14          purpose -- is the sole person, excuse me, in that office.  
15          No one else have access to an office, so no one else could  
16          go in there and sneak in there just pull my file and just  
17          type something on there. It don't work like that. That's  
18          her office, she got the only key to it. And so for the  
19          defendant to make some claim that, you know, mysteriously  
20          somehow somebody else put that on the hearing report,  
21          that's -- that's false, and it's designed to, like I say,  
22          pull you away from the actual facts.

23                   The actual fact is, these are her coworkers.  
24          Most officers stick together. That's just the way it go.  
25          And she did inform me that, "Because of the conflict that



1           you're having in food service," you'll read the grievances  
2           yourself, I wrote a number of them, "I'm terminating you  
3           from food service to alleviate the problem." That's normal  
4           behavior in prison.

5                     If an officer believe that you having a conflict  
6           in a particular area where other officers, they'll remove  
7           you from that. And if they can't do it legitimately,  
8           they'll do it illegally, as she did by falsifying that  
9           report, claiming that I caught a misconduct, knowing I  
10          didn't. Then when she was confronted about it, she said  
11          oh, well, it's for various reasons. Then when the people  
12          in Lansing asked her about it, she came up with something  
13          else. Now we here today, now it's, "Well, you were doing  
14          legal work for people. You could have put somebody else  
15          life in danger."

16                    That's not -- don't none of that stuff mean  
17          nothing, because that's not what you put on that  
18          classification report. That's not on there. And the  
19          defense would like for you to believe that somehow you can  
20          bypass that, but that's how we got here in the first place,  
21          people not following the policy and procedure, because they  
22          don't believe prisoners have rights in the first place.  
23          That's why I agree with the judicial system.

24                    1983, they bless us and give us the opportunity  
25          to bring our claims to this court, and it's a hard road to

1 get to. You just don't get in here. Everybody can't get  
2 in here. It's a hard road to get here. A lot of people  
3 get knocked out the box at the screening process. This is  
4 a hard road. You won't see many prisoners sitting in that  
5 seat there, trust me. So I got to have some form of a  
6 claim. And I'm explaining to you people today that if you  
7 just review the evidence, you ain't got to listen to what I  
8 say, you don't have to listen to what nobody else's  
9 testimony is, if you just review the evidence itself, you  
10 will see that I have met each element of the claim. Thank  
11 you.

12 THE COURT: All right, thank you, Mr. Dykes-Bey.

13 Ladies and gentlemen, you've now heard all the  
14 evidence in the case, you've heard closing arguments from  
15 the parties. It's now my responsibility to give you the  
16 law that you'll apply in deciding this case.

17 I'll start by explaining your duties and the  
18 general rules that apply in every civil case, then I'll  
19 explain the elements of the claim made by Mr. Dykes-Bey,  
20 then I'll explain some rules that you must use in  
21 evaluating the evidence. Please listen very carefully to  
22 everything I say.

23 Under the First Amendment to the United States  
24 Constitution, individuals have a right to petition the  
25 government for a redress of grievances. Mr. Dykes-Bey was

1 an inmate at the Michigan Reformatory in Ionia, Michigan.  
2 In this case, a prisoner, such as Mr. Dykes-Bey, retains  
3 his First Amendment right to file grievances against prison  
4 officials.

5 Mr. Dykes-Bey claims that defendant Marshall,  
6 Mrs. Kerr, a prison official at the Michigan Reformatory,  
7 denied his first amendment rights by retaliating against  
8 him. Defendant Marshall, Mrs. Kerr, denies that she  
9 deprived him of his First Amendment rights for filing  
10 grievances.

11 You have two main duties as jurors. The  
12 first -- the first one is to decide what the facts are from  
13 the evidence that you've seen or heard here in court.  
14 Deciding what the facts are is your job, not mine, and  
15 nothing that I have said or done during this trial was  
16 meant to influence your decision about the facts in any  
17 way.

18 Your second duty is to take the law that I give  
19 you, apply it to the facts, and decide what claims, if any,  
20 plaintiff, Mr. Dykes-Bey, has proved by a preponderance of  
21 the evidence.

22 It is my job to instruct you about the law, and  
23 you are bound by the oath you took at the beginning of the  
24 trial to follow the instructions that I give you, even if  
25 you personally disagree with them. This includes the

1 instructions that I gave you before and during the trial,  
2 and these instructions. All the instructions are  
3 important, and you should consider them together as a  
4 whole.

5 Mr. Dykes-Bey and Mr. Dean have talked about the  
6 law during their arguments, but if whey that said is  
7 different from what I say, you must follow what I say.  
8 What I say about the law controls. Perform these duties  
9 fairly. Do not let any bias, sympathy, or prejudice you  
10 may feel toward one side or the other influence your  
11 decision in any way.

12 You must make your decision based only on the  
13 evidence that you saw and heard here in court. Do not let  
14 rumor, suspicions, or anything else that you may have seen  
15 or heard outside of court influence your decision in any  
16 way.

17 The evidence in this case includes only what the  
18 two witnesses said while they were testifying under oath,  
19 the exhibits that I allowed into evidence which are  
20 contained in the evidence book, the exhibit book you'll  
21 receive, and the stipulations the lawyers -- the parties  
22 agreed to, nothing else is evidence. The statements and  
23 arguments by Mr. Dykes-Bey and Mr. Dean are not evidence,  
24 their questions and objections are not evidence. My legal  
25 rulings are not evidence, and my comments and my questions

1           are not evidence.

2                       During the trial I did not let you hear the  
3           answer to some questions which were asked and sometimes --  
4           oh, I don't think I ordered you to disregard anything, but  
5           we do have a stipulation that some of the exhibits can be  
6           considered only for a limited purpose, which I read to you.  
7           Things that are not in evidence, however, must not  
8           influence your decision in any way. Make your decision  
9           based only on the evidence as I have defined it here, and  
10          nothing else.

11                    You should use your commonsense in weighing the  
12          evidence. Consider it in light of your everyday experience  
13          with people and events, and give it whatever weight you  
14          believe it deserves. If your experience tells you that  
15          certain evidence reasonably leads to a conclusion, you're  
16          free to reach that conclusion. Unless and until outweighed  
17          by evidence in the case to the contrary, you may find that  
18          official duty has been regularly performed, that private  
19          transactions have been fair and regular, and that the  
20          ordinary course of business or employment has been  
21          followed, that things have happened according to the  
22          ordinary course of nature and the ordinary habits of life,  
23          and that the law has been obeyed.

24                    Now some of you have heard the terms "direct  
25          evidence" and "circumstantial evidence." Direct evidence

1 is simply evidence, like the testimony of an eyewitness,  
2 which if you believe it, directly proves a fact. If a  
3 witness testified that it's raining outside, and you  
4 believed the witness, that would be direct evidence that it  
5 was raining. Circumstantial evidence is simply a chain of  
6 circumstances that indirectly proves a fact. If someone  
7 walked into the courtroom wearing a raincoat covered with  
8 drops of water and carrying a wet umbrella, that would be  
9 circumstantial evidence from which you could conclude that  
10 it was raining.

11 It's your job to decide how much weight to give  
12 the direct and circumstantial evidence. The law makes no  
13 distinction between the weight that you should give to  
14 either one or the other, or nor does it say that one is any  
15 better evidence than the other. You should consider all  
16 the evidence, both direct and circumstantial, and give it  
17 whatever weight you believe it deserves.

18 Another part of your duties as jurors is to  
19 decide how credible or believable each witness was. This  
20 is your duty, not mine. It's up to you to decide if a  
21 witness's testimony was believable, and how much weight you  
22 think it deserves. You are to -- you are free to believe  
23 everything that a witness said, only part of it, or none of  
24 it at all. But you should act reasonably and carefully in  
25 making these decisions. Let me suggest some things for you

1 to consider in evaluating each witness's testimony.

2 Ask yourself if the witness was able to clearly  
3 see or hear the events. Sometimes even an honest witness  
4 may not have been able to see or hear what was happening,  
5 and may make a mistake. Ask yourself how good the  
6 witness's memory seemed to be. Did the witness seem able  
7 to accurately remember what happened? Ask yourself if  
8 there was anything else that may have interfered with the  
9 witness's ability to perceive or remember the events. Ask  
10 yourself how the witness acted while testifying. Did the  
11 witness appear to be honest, or did the witness appear to  
12 be lying. Ask yourself if the witness had any relationship  
13 to a party, which really doesn't apply here because the  
14 only witnesses are the parties. So ask yourself whether  
15 the witness had anything to gain or lose that might  
16 influence the witness's testimony. Ask yourself if the  
17 witness testified inconsistently while on the witness  
18 stand, or if the witness said or did something or failed to  
19 say or do something at any other time that is inconsistent  
20 with what the witness said while testifying.

21 If you believe that a witness was inconsistent,  
22 ask yourself if this makes the witness's testimony less  
23 believable. Sometimes it may, other times it may not.  
24 Consider whether the inconsistency was about something  
25 important or about some unimportant detail. Ask yourself

1 if it seemed like an innocent mistake or if it seemed  
2 deliberate. And ask yourself how believable the witness's  
3 testimony was in light of all the other evidence. Was the  
4 witness's testimony supported or contradicted by other  
5 evidence that you found believable.

6 If you believe that a witness's testimony was  
7 contradicted by other evidence, remember that people  
8 sometimes forget things, and that even two honest people  
9 who witnessed the same event may not describe it in exactly  
10 the same way.

11 These are only some of the things you may  
12 consider in deciding how believable each witness was. You  
13 may also consider other things you think shed some light on  
14 a witness's believability. Use your commonsense and your  
15 everyday experience in dealing with people, and then decide  
16 what testimony you believe and how much weight you think it  
17 deserves.

18 Do not make any decision based only on the  
19 number of witnesses who testified or the quantity of  
20 evidence presented. What is more important is how  
21 believable the witnesses were, and how much weight you  
22 think their testimony deserves, and which evidence appears  
23 to your minds as being the most accurate and otherwise  
24 trustworthy.

25 No party must call as witnesses all persons who



1           may have been present at any time or place involved in the  
2           case, or who may appear to have some knowledge of the  
3           matters at issue in this trial. Nor does the law require  
4           any party to produce as exhibits all papers and things  
5           mentioned in the evidence in the case.

6           The testimony of a single witness which produces  
7           in your minds belief in the likelihood of truth is  
8           sufficient for the proof of any fact and would justify a  
9           verdict in accordance with such testimony.

10          Mr. Dykes-Bey and Mr. Dean objected to some of  
11          the things that were said or done during the trial. Do not  
12          hold that against either side. Mr. Dykes-Bey and Mr. Dean  
13          had a duty to object when they thought that something not  
14          permitted by the rules of evidence was happening. These  
15          rules are designed to make sure that both sides receive a  
16          fair trial.

17          Do not interpret my rulings on those objections  
18          as any indication of how I think the case should be  
19          decided. My rulings were based on the rules of evidence,  
20          not on any opinion I might have about the case. Remember  
21          that your decision must be based only on the evidence that  
22          you saw and heard here in court.

23          I want to emphasize that this trial is only on  
24          the particular claim alleged in Mr. Dykes-Bey's complaint,  
25          the claim that you've heard about during the course of this

1 trial. Your job is limited to deciding whether  
2 Mr. Dykes-Bey has proven that claim or not.

3 The burden on Mr. Dykes-Bey to prove the claim,  
4 is to prove every essential element by a preponderance of  
5 the evidence. If the proofs should fail to establish any  
6 essential element of the claim by a preponderance, you  
7 should find for the defendant as to the claim.

8 To establish by a preponderance means to prove  
9 that something is more likely so than not so. In other  
10 words, a preponderance of the evidence means such evidence  
11 as when considered and compared with that opposed to it has  
12 more convincing force and produces in your minds belief  
13 that what is sought to be proved is more likely true than  
14 not true.

15 If on any issue in the case the evidence is  
16 equally balanced, you cannot find that the issue has been  
17 proven by a preponderance of the evidence. This rule does  
18 not, of course, require proof to an absolute certainty.  
19 Since proof to an absolute certainty is seldom possible in  
20 any case. Furthermore, it does not require proof beyond a  
21 reasonable doubt. Proof beyond a reasonable doubt is a  
22 stricter and higher standard that applies only in criminal  
23 cases. It does not apply in civil cases such as this.

24 The elements of a first amendment retaliation  
25 claim require that Mr. Dykes-Bey prove each of the

1 following three elements. First, that his conduct was  
2 protected by the First Amendment. Now, that element has  
3 been conceded by Mr. Dean, so you may consider that having  
4 been proven already. Second, that Mr. -- that the  
5 defendant, Ms. Marshall, Ms. Kerr, took an adverse action  
6 against Mr. Dykes-Bey. And third, that Mrs. Kerr's adverse  
7 action was motivated at least in part by Mr. Dykes-Bey --  
8 Mr. Dykes-Bey's protected conduct. I'll explain each of  
9 these elements in greater detail in a moment. If you find  
10 that Mr. Dykes-Bey has proven each of these elements by a  
11 preponderance of the evidence, your verdict should be for  
12 him.

13 I'm going to not discuss the first element since  
14 it's been conceded, so we'll go to the second element,  
15 adverse action. And adverse action is one that is capable  
16 of deterring a person of ordinary firmness from pursuing  
17 his First Amendment rights. If you believe that plaintiff  
18 has proven by a preponderance of the evidence that  
19 defendant took action against plaintiff, that would deter a  
20 person of ordinary firmness from filing grievances against  
21 defendant, then defendant has taken an adverse action  
22 against the plaintiff.

23 Plaintiff also has the burden of establishing by  
24 a preponderance that his protected conduct was a motivating  
25 factor in the defendant's adverse action. This does not

1 mean that plaintiff's protective conduct must be the only  
2 factor that motivated the defendant's adverse action.

3 In this case plaintiff must establish that  
4 defendant was motivated to take adverse action against  
5 plaintiff at least in part because he filed grievances  
6 against other prison officials. In considering whether  
7 plaintiff's protected conduct was a motivating factor in  
8 defendant's adverse action, you may consider such factors  
9 as defendant's statements, as well as the length of time  
10 between plaintiff's protected conduct and defendant's  
11 alleged adverse action.

12 If plaintiff shows that his protected conduct  
13 was a motivating factor in the defendant's actions, the  
14 defendant then bears the burden of establishing, also by a  
15 preponderance of the evidence, that she would have taken  
16 the same action, even if plaintiff had not engaged in the  
17 protected activity or conduct. If you find either that  
18 plaintiff has failed to prove by a preponderance all of the  
19 things required of him, or that defendant has shown by a  
20 preponderance that she would have taken the same action  
21 even without the protected activity, your verdict will be  
22 for the defendant.

23 An injury or damage is proximately caused by an  
24 act or a failure to act whenever it appears from the  
25 evidence in the case that the act or omission played a

1 substantial part in bringing about or actually causing  
2 injury or damage, and that the injury or damage was either  
3 a direct result or a reasonably probable consequence of the  
4 act or omission. That means there must have been a  
5 connection between the defendant's actions and the  
6 plaintiff's injury. And second, that the occurrence which  
7 has claimed to have produced the injury was a natural and  
8 probable result of defendant's conduct.

9 If the plaintiff has proven a claim against the  
10 defendant by a preponderance of the evidence, you must  
11 determine the damages to which the plaintiff is entitled.  
12 You should not interpret the fact that I'm giving  
13 instructions about the plaintiff's damages as an indication  
14 that I believe the plaintiff should or should not win the  
15 case. It is your task first to decide whether the  
16 defendant is liable.

17 I'm instructing you on damages only so that you  
18 will have guidance in the event you decide that the  
19 defendant is liable and that plaintiff is entitled to  
20 recover money from defendant.

21 Damages must be reasonable. If you should find  
22 that the plaintiff is entitled to a verdict, you may award  
23 the plaintiff only such damages as will reasonably  
24 compensate the plaintiff for such injury and damage as you  
25 find from a preponderance of the evidence was sustained as

1 a proximate result of defendant's acts or omissions.

2 Compensatory damages are not restricted to the  
3 actual loss of time or money. They cover both the mental  
4 and physical aspects of injury, tangible and intangible.  
5 They are an attempt to restore the plaintiff, that is make  
6 the plaintiff whole, or as the plaintiff was immediately  
7 prior to the injuries. You are not permitted to award  
8 speculative damages, so you are not to include in your  
9 verdict compensation for any prospective loss, which,  
10 although possible, is not reasonably certain to occur in  
11 the future.

12 If you return a verdict in the plaintiff's favor  
13 on his claims but find that he failed to meet his burden of  
14 proving that he suffered actual damages, then you must  
15 award the plaintiff nominal damages, not to exceed one  
16 dollar. Nominal damages are the law's way of recognizing  
17 that Constitutional rights must be scrupulously observed,  
18 even when Constitutional violations have not been shown to  
19 have caused actual injury.

20 In addition to the damages mentioned in the  
21 other instructions, the law permits you to award an injured  
22 person punitive damages under certain circumstances. In  
23 order to punish the defendant for extraordinary misconduct  
24 and to serve as an example or warning to others not to  
25 engage in such conduct. If you find in favor of the

1 plaintiff and against the defendant, then you may, but are  
2 not required to, award the plaintiff an amount as punitive  
3 damages, if you find it is appropriate to punish the  
4 defendant or to deter the defendant and others from like  
5 conduct in the future. Whether to award the plaintiff  
6 punitive damages and the amount of those damages is within  
7 your sound discretion.

8 If you decide the plaintiff has suffered  
9 damages, then you should award plaintiff the amount of  
10 interest which you find will fairly compensate the  
11 plaintiff for loss of use of the plaintiff's funds. If you  
12 decide to award interest, the interest should begin to run  
13 on the date when plaintiff's total damages became  
14 ascertainable, which would be November 12, 2014. The  
15 interest should run from that day through today's date, and  
16 the interest rate shall be 2.622 percent.

17 That concludes the part of my instructions  
18 containing the elements of the claim made by plaintiff and  
19 how to calculate the damages if you find that damages  
20 should be awarded. Next I'll explain some rules you must  
21 use in considering some of the testimony and the evidence.  
22 The parties have agreed to certain stipulations of fact. I  
23 have read those to you. You should treat those facts as  
24 having been proved.

25 Some of the exhibits have been admitted for a

1           limited purpose. I read the stipulation concerning those  
2           exhibits and the limit purpose to you during the course of  
3           the trial.

4                   Impeachment by inconsistent statement. A  
5           witness may be discredited or impeached by contradictory  
6           evidence by showing that he or she testified falsely  
7           concerning a material matter, or by evidence that at some  
8           other time the witness has said or done something or failed  
9           to say or do something which is inconsistent with the  
10          witness's present testimony. If you believe any witness  
11          has been so impeached, then it is your exclusive province  
12          to give the testimony of that witness such credibility or  
13          weight, if any, as you may think it deserves.

14                   Now, let me conclude by explaining some things  
15          about your deliberations in the jury room and your possible  
16          verdicts. The first thing you should do in the jury room  
17          is choose someone to be your foreperson. This person will  
18          help guide your discussions and will speak for you here in  
19          court. Once you start deliberating, do not talk to the  
20          jury officer or to me or to anyone else, except each other,  
21          about the case. If you have any question or message, you  
22          must write it down on a piece of paper, sign it, and then  
23          give it to the jury officer. The officer will give the  
24          message to me and I will respond as soon as I can. I may  
25          have to talk to Mr. Dykes-Bey and Mr. Dean about what you



1 have asked, so it may take me some time to get back to you.  
2 Any question or message normally should be sent to me  
3 through your foreperson.

4 You will be given the documents that were  
5 admitted into evidence. If you want to see any of the  
6 exhibits that were admitted into evidence and which you do  
7 not have, you may send me a message and those exhibits will  
8 be provided to you.

9 One more thing about messages. Do not ever  
10 write down or tell anyone how you stand on your votes. For  
11 example, do not write down or tell anyone that you are  
12 split or whatever your vote happens to be. That should  
13 stay secret until you are finished.

14 Remember you must make your decision based only  
15 on the evidence you saw and heard here in court. The  
16 instructions I have given you throughout the trial also  
17 apply to your deliberations. Do not try to gather any  
18 information about the case on your own. Do not bring any  
19 book, like a dictionary or anything else, to help you with  
20 your deliberations. Do not conduct any independent  
21 research, reading, or investigation about the case.

22 In addition to not discussing the case with  
23 anyone in person or on the telephone, you are not to use  
24 electronic communications about this case with anyone until  
25 you have reached your final conclusion in the case and you

1 are told that you can discuss the case under the conditions  
2 that I will describe to you at that time.

3 It would violate your oath, for example, to try  
4 to keep a family member, friend, or the media up-to-date  
5 about what is happening during the trial or while you are  
6 in the jury room. For example, do not use e-mail or sites  
7 such a Twitter to communicate about the case. Such  
8 communications, whether you intend so or not, would involve  
9 people who are not jurors in possibly influencing you in  
10 your decision at the conclusion of the trial. These people  
11 have not taken your oath to make a decision based solely on  
12 the evidence that you hear in court.

13 Remember that both parties are entitled to a  
14 fair trial by you, and you must follow the instructions as  
15 to the law that I am giving you now, and that I gave you  
16 throughout the trial. Make your decisions based only on  
17 the evidence that you saw and heard here in court.

18 Now that all the evidence is in and the  
19 arguments are complete, you are free to talk about the case  
20 in the jury room. In fact it's your duty to talk with each  
21 other about the evidence and to make every reasonable  
22 effort you can to reach unanimous agreement. You must  
23 reach unanimous agreement. The verdict must be unanimous.  
24 Talk with each other, listen carefully and respectfully to  
25 each other's views, and keep an open mind as you listen to

1           what your fellow jurors have to say. Try your best to work  
2           out differences. Do not hesitate to change your mind if  
3           you are convinced that other jurors are right and that your  
4           original position was wrong. Also be mindful that you each  
5           may process information differently or have different  
6           approaches to your deliberations. For example, some of you  
7           may need to think quietly, while others may want to openly  
8           discuss their thoughts. It may take more time for some of  
9           you than for others to reach a decision. Be patient and  
10          considerate of each other's needs as you deliberate.

11                 Try your best to work out your differences. Do  
12          not hesitate to change your mind if you are convinced that  
13          other jurors are right and your original position was  
14          wrong. But do not ever change your mind just because other  
15          jurors see things differently, or just to get the case over  
16          with. In the end your vote must be exactly that, your own  
17          vote. It is important for each of you to reach agreement,  
18          but only if you can do so honestly and in good conscience.

19                 No one will be allowed to hear your discussions  
20          in the jury room, and no record will be made of what you  
21          say. You should all feel free to speak your minds. Listen  
22          carefully to what other jurors have to say, then decide for  
23          yourself whether plaintiff's claims were proved by a  
24          preponderance of the evidence.

25                 I have prepared a verdict form for your use. A

1 verdict form is simply the written notice of your decision.  
2 Whatever decision you reach in this case must be the  
3 unanimous decision of all of you. When all of you agree  
4 upon a verdict, it will be received as your verdict. The  
5 form is fairly short and simple and it says simply this:  
6 "Regarding plaintiff's claim that defendant violated  
7 plaintiff's rights under the First Amendment, we, the jury,  
8 find in favor of" and then there's a line where you can  
9 check "plaintiff" or a line where you can check  
10 "defendant."

11 Go to damages only if you have found in favor of  
12 plaintiff. If your verdict was in favor of plaintiff,  
13 state the amount of damages sustained by plaintiff. And  
14 then there are three lines, one each for compensatory, one  
15 for nominal, and one for punitive damages. Have the  
16 verdict signed and dated by your foreperson, then ring the  
17 doorbell. Your foreperson should give a note to the  
18 bailiff that you have reached a verdict. Your foreperson  
19 will deliver the verdict form to me in the courtroom.

20 When you answer one or all -- after the -- I'm  
21 sorry. After the verdict form is completed, we'll come  
22 back into the courtroom and the parties will be informed of  
23 your verdict. Let me emphasize something I said earlier.  
24 Nothing that I have said or done during this trial was  
25 meant to influence your decision in any way. You decide

1           for yourselves whether plaintiff's claims were proved by a  
2           preponderance of the evidence.

3                       That concludes the instructions. I know in my  
4           preliminary instructions I told you that I was going to  
5           give you a written copy of these instructions to take with  
6           you, however, as I have been reading the instructions, I  
7           have been making changes which I thought were warranted  
8           because of the evidence, the way the evidence came in in  
9           the case, and other factors. So I'm not going to give you  
10          a written copy of the instructions and you should rely on  
11          your collective memory of the instructions that I delivered  
12          to you during the course of the trial and just now.

13                      One other issue before I send you back to  
14          deliberate. We will be collecting all cellular devices. I  
15          think there's a basket, isn't there, Stef, right outside  
16          the jury room? So if you would be so kind as to deposit  
17          your devices into that basket, I would greatly appreciate  
18          it. That concludes the instructions. Stephanie, are we  
19          good to go?

20                      THE CLERK: Have an oath.

21                      THE COURT: Okay. Stephanie will now give you  
22          an oath concerning your deliberations.

23                      THE CLERK: If you would stand and raise your  
24          right hands, please.

25                      Do you and each of you swear or affirm that you

1 will well and truly try and true deliverance make in the  
2 case now on trial and render a true verdict according to  
3 the law and the evidence, so help you God?

4 THE JURORS: We do.

5 (At 10:03 a.m., jurors sworn.)

6 THE CLERK: Be seated.

7 THE COURT: I'm now going to have Mr. Dion and  
8 Ms. Carpenter sworn as officers and put them in charge of  
9 you during your deliberations, so if you would please both  
10 raise your right hands.

11 Do you swear or affirm to keep this jury  
12 together and permit no one to communicate with them orally  
13 or otherwise, nor to do so yourself unless ordered by me,  
14 except to communicate questions and the arrival at  
15 agreement on a verdict to the court until discharged by me  
16 so help you God?

17 THE BAILIFFS: I do.

18 (At 10:03 a.m., bailiffs sworn.)

19 THE COURT: All right, ladies and gentlemen.  
20 We'll send you off to deliberate now.

21 (At 10:03 a.m., jurors exit courtroom.)

22 THE COURT: All right, well, anything we need to  
23 talk about?

24 MR. DEAN: Yeah, just a couple of things.

25 THE COURT: Sure.

1 MR. DEAN: On instruction CV 9.01 --

2 THE COURT: All right, hold on, what page is  
3 that?

4 MR. DEAN: 31. I don't know how I missed it  
5 when I was looking through last night, but the instruction  
6 where the exhibits, if they want to they have to -- this  
7 was a pretty document-intensive case, I guess I would say,  
8 so I'm wondering if there's any reason why we can't just  
9 have the exhibit book delivered to them now.

10 THE COURT: Yeah. No, I intended to do that,  
11 I'm sorry.

12 MR. DEAN: Okay. Okay.

13 THE COURT: No, I intended the --

14 MR. DEAN: That instruction always --

15 THE COURT: -- exhibits to go back, yeah.

16 MR. DEAN: I've seen it in another case, and we  
17 always end up striking it, and I missed it this time.

18 THE COURT: Yeah. Well, and clearly I missed  
19 things when I was going through because there were  
20 instructions which, as I'm preparing to read them I think,  
21 those don't apply here. So I just, you know, made  
22 revisions on the fly.

23 MR. DEAN: Okay. Yeah, I noticed that. Page 28  
24 the last paragraph where the witness was convicted of a  
25 felony. I just want to put a general objection on there in

1 case I need it later that I think it's an important  
2 instruction that we normally read.

3 THE COURT: Well, no, but there was no evidence  
4 that came in in this case that anybody was convicted.

5 MR. DEAN: Well, other than the fact that the  
6 whole case was he is a prisoner, so --

7 THE COURT: But -- but, and here's my response  
8 to your objection. He's a prisoner, but the jurors don't  
9 know what that means.

10 MR. DEAN: Okay.

11 THE COURT: They -- you know, there was no  
12 testimony about what a felony is --

13 MR. DEAN: Okay.

14 THE COURT: -- as opposed to a misdemeanor.  
15 There was no testimony in the case that anybody had been  
16 convicted of a felony, and that it was reason I decided not  
17 to read it.

18 MR. DEAN: Okay.

19 THE COURT: I mean I think you could have  
20 offered that evidence if you chose to.

21 MR. DEAN: Sure.

22 THE COURT: Anything else? Mr. Dean?

23 MR. DEAN: Nothing from me, your Honor.

24 THE COURT: Mr. Dykes-Bey, anything from you,  
25 sir?



1 MR. DYKES-BEY: No.

2 THE COURT: Okay. Well, you know, when the jury  
3 comes back, Mr. Dykes-Bey, I'll have you taken back to the  
4 lock-up while we wait.

5 MR. DYKES-BEY: Yeah.

6 THE COURT: When the jury comes back it can be  
7 very emotional.

8 MR. DYKES-BEY: Yes.

9 THE COURT: And Mr. Dykes-Bey, you've been a  
10 perfect gentleman here, and may I say I think you did an  
11 excellent job of presenting your own case. I was very  
12 impressed by the job you did. And I, you know, feel  
13 confident that you will continue to comport yourself as a  
14 gentleman regardless of what the jury decides in this case.

15 MR. DYKES-BEY: Oh, yes.

16 THE COURT: All right, we'll see you when the  
17 jury comes back, unless they have a question or a note,  
18 then we'll all come back and deal with that.

19 (At 10:06 a.m., court in recess.)

20 (At 11:11 a.m., court reconvened.)

21 THE COURT: All right, we're back on the record.  
22 It's 11:10 a.m., it's August 23. The jury is deliberating.  
23 We've received a question. I'm going to read you the  
24 question now. "Can we know the date Dykes-Bey was  
25 incarcerated?" That is the question. So I don't know what

1           that means, exactly, but thoughts about that?

2           Mr. Dykes-Bey?

3                   MR. DYKES-BEY: I don't understand the  
4           relevance.

5                   THE COURT: Mr. Dean?

6                   MR. DEAN: I don't know the relevance either,  
7           your Honor. I mean --

8                   THE COURT: I don't either. You know what I  
9           can't -- what I won't do is give them any information that  
10          is not in evidence in the case. So if we were going to --  
11          if I was going to give them an answer to this question, it  
12          would have to be an answer that was introduced as evidence.  
13          So I'll tell you we've looked, Mr. Dion looked through the  
14          exhibits and I'm not, you know, obviously, it wasn't with a  
15          magnifying glass, but in Exhibit 13 on the first page  
16          there's, it's a program classification report, and there's  
17          a date up in the upper left says, "Arrival date 7/1/2013."

18                   MR. DYKES-BEY: That's when I got to --

19                   THE COURT: Facility?

20                   MR. DYKES-BEY: -- Michigan Reformatory.

21                   THE COURT: Okay. I mean I guess I wouldn't be  
22          opposed to giving them that date. I don't know. It's --

23                   MR. DEAN: It's just I'm just trying to rack my  
24          brain, what would be the possible --

25                   THE COURT: I mean one, you know one thing --

1 obviously there are a lot of reasons that they could be  
2 asking for this information, reasons that I wouldn't even  
3 be able to guess at. They might be, I suppose, engaged in  
4 some kind of damage calculation, and I think in the  
5 instruction, though, right, I read in the interest  
6 instruction I -- there was a date, I gave a date of in  
7 2014 --

8 MR. DEAN: Yeah, I --

9 THE COURT: -- for the date the damages,  
10 essentially, I mean we could give them that date. It's  
11 part of the damage instruction.

12 MR. DEAN: That instruction is kind of  
13 confusing. The date you were picking was the date he was  
14 terminated from his job?

15 MR. DYKES-BEY: No.

16 MR. DEAN: What is the --

17 MR. DYKES-BEY: I was terminated May 14, 2014.

18 THE COURT: Yeah, I can't remember how we picked  
19 that.

20 MR. DYKES-BEY: November was the day in which I  
21 filed my compliant, it was filed with the Court.

22 THE COURT: Okay.

23 MR. DYKES-BEY: November, 2014.

24 MR. DEAN: Yeah, I would steer away from any  
25 mention of that instruction, because I don't know that --

1           yeah, I -- I guess the only way I would say that the  
2           question, at least from my standpoint, could be answered is  
3           that we don't know that it was ever introduced as evidence,  
4           so it can't really be a fact used in determining your  
5           decision one way or the other.

6                     MR. DYKES-BEY: Well, can you ask for  
7           clarification? Do they mean -- do they mean incarceration,  
8           or do they mean the date in which I arrived at that  
9           facility?

10                    THE COURT: Yeah. We try not to get involved in  
11           a dialogue with them.

12                    MR. DYKES-BEY: Okay.

13                    THE COURT: And, you know, I'm not sure what I'm  
14           going to do. You know, sometimes we just will answer "No,  
15           we can't give you that information."

16                    MR. DEAN: That might be the simplest way.

17                    THE COURT: I guess if I said -- I mean but if I  
18           say, "No," that's the, you know, that would be the end of  
19           it, in all likelihood. And they have the -- they have the  
20           documents. I mean they can look at, you know, and maybe  
21           that has something to do with it. Maybe they've been  
22           looking through the exhibits and this question was  
23           generated by something they saw in one of the exhibits.  
24           But, of course, I'm just speculating. I have no idea. I  
25           mean, I guess I think it was obvious from all of the

1 evidence that you were incarcerated during all relevant  
2 time periods that have to do with this case.

3 MR. DYKES-BEY: Uh-huh.

4 THE COURT: I could say that, I suppose.  
5 Mr. Dykes-Bey was incarcerated during all time periods  
6 relevant to this case. I think there was even a  
7 stipulation in the pretrial order saying something like  
8 that, but.

9 MR. DEAN: Yeah. I mean I guess from my  
10 standpoint it worries me, if they're using the date as a  
11 damage calculation. I don't think it has any relevance at  
12 all to a damage calculation, so my preference would be the  
13 shorter the better. We don't think it was evidence that  
14 was introduced at trial, so it's not something they can  
15 consider, but.

16 THE COURT: Did the date of your termination --  
17 did you testify to that? Do you remember?

18 MR. DYKES-BEY: Yeah. Yeah, I did.

19 THE COURT: That you were terminated on November  
20 something?

21 MR. DYKES-BEY: May 14th, 2014.

22 THE COURT: May 14 you were terminated.

23 MR. DYKES-BEY: Uh-huh. I say I started, you  
24 know, I got to Michigan Reformatory and I started work  
25 August 2013.

1 THE COURT: '13.

2 MR. DYKES-BEY: Until May 2014.

3 THE COURT: I mean we could, you know, we could  
4 give the date he got there.

5 MR. DYKES-BEY: Which was --

6 THE COURT: July 1.

7 MR. DYKES-BEY: Yup, July 1st.

8 THE COURT: If the program classification, I  
9 could say something like that.

10 MR. DYKES-BEY: No, I do believe my out date is  
11 on there already, though. At the top.

12 THE COURT: Your out date?

13 MR. DYKES-BEY: Yeah. All that information is  
14 on there anyway, but it was never discussed.

15 THE COURT: Yeah. Well, and so your point would  
16 be they have it?

17 MR. DYKES-BEY: They already have it.

18 THE COURT: They already have it, so why give it  
19 to them again. So Mr. Dykes-Bey, are you telling me you  
20 would vote for my answer being, "No, we can't give you that  
21 information?"

22 MR. DYKES-BEY: I'm going to leave that up to  
23 you, your Honor.

24 THE COURT: Do you have a strong feeling one way  
25 or the other on that subject?

1 MR. DYKES-BEY: No, I'm actually confused by it.

2 THE COURT: Yeah. As am I. I mean I'm confused  
3 about why they want that information and what they would do  
4 with it. Mr. Dean?

5 MR. DEAN: Your Honor, I prefer, "No."

6 THE COURT: You'd prefer a "No?"

7 MR. DEAN: That we can't answer it.

8 THE COURT: All right. Well, I'm going to go  
9 back, talk to Jim a bit, and we'll decide what we're going  
10 to do, and I'll let you know what I've done after I've done  
11 it. Can you leave Mr. Dean here -- or Mr. Dean. You can  
12 leave Mr. Dean here. Can you leave Mr. Dykes-Bey here for  
13 a little while while Jim and I talk?

14 OFFICER: Yes, your Honor.

15 THE COURT: Okay.

16 (At 11:19 a.m., court in recess.)

17 (At 11:29 a.m., court reconvened.)

18 THE COURT: All right, this is what I'm going to  
19 do. I'm going to send them a note in response which says,  
20 "In response to your question, plaintiff was a prisoner  
21 under the custody of the Michigan Department of Corrections  
22 at all times relevant to the complaint." That language is  
23 taken verbatim out of the final pretrial order, ECF number  
24 114, under Section Controverted -- Uncontroverted --  
25 Uncontroverted Facts, B.

1                   Objection to that, Mr. Dykes-Bey?

2                   MR. DYKES-BEY: No, your Honor.

3                   THE COURT: Mr. Dean?

4                   MR. DEAN: No, your Honor.

5                   THE COURT: Okay. All right, we'll be adjourned  
6 again.

7                   (At 11:30 a.m., court in recess.)

8                   (At 11:48 a.m., court reconvened.)

9                   THE COURT: All right, the jury has come up with  
10 another question. I'm going to read it to you now. Quote,  
11 "What are the three parts of complaint we are deciding on?  
12 Number one, done. Number two, question mark, question  
13 mark, question mark. Number three, Nancy retaliation." So  
14 what I'm contemplating doing is rereading the specific  
15 element of claims instruction on page 16-CV 3.03. Do you  
16 have -- you don't have those with you? Can -- you have  
17 that clean copy, Jim, that you could put in front of  
18 Mr. Dykes-Bey?

19                   MR. DEAN: I think, if I may, the one part that  
20 might be a little confusing is after page 16, the first  
21 three elements are read. "I will explain each of these  
22 elements in greater detail in a moment. If you find the  
23 plaintiff has proven each of these elements by a  
24 preponderance of the evidence, your verdict will be for the  
25 plaintiff." But then on the next page we talk about the



1           rebuttal burden.

2                   THE COURT: Uh-huh.

3                   MR. DEAN: So it might be confusing there  
4 because then we go into if he shows those three things, the  
5 defendants can show that they would have taken the same  
6 action anyway.

7                   THE COURT: Possibly.

8                   MR. DEAN: So maybe --

9                   THE COURT: I am disinclined -- I'm inclined to  
10 simply try to recreate exactly what I said the first time.

11                  MR. DYKES-BEY: Are they asking clarification  
12 for what the other two are, or --

13                  THE COURT: Well, I just read, I mean here, I'll  
14 read it again. This is exactly what the note -- I'm trying  
15 to read the note exactly, so it's quote, "What are the  
16 three parts of complaint we are deciding," it looks like  
17 "or," but I'm guessing it's "on." "Number one, done.  
18 Number two, three question marks, number three Nancy  
19 retaliation." That's it. So again, I don't know.

20                  MR. DYKES-BEY: I think they want to know what  
21 they supposed to decide on?

22                  THE COURT: Yeah. I mean, "What are three parts  
23 of the complaint." I think they mean "what are the  
24 elements."

25                  MR. DYKES-BEY: That's what I'm thinking, too.

1 THE COURT: That's what I'm taking it, which is  
2 why I'm proposing to read the elements instruction again.  
3 Any objection to that, Mr. Dykes-Bey?

4 MR. DYKES-BEY: No, your Honor.

5 THE COURT: Mr. Dean?

6 MR. DEAN: The only thing I'd bring up is in my  
7 notes I've got you kind of ad libbed on the protected  
8 conduct instruction saying that you weren't going to read  
9 it because defendants conceded that.

10 THE COURT: Yup.

11 MR. DEAN: So as long as we're pretty close to  
12 that, then I'm fine.

13 THE COURT: Yup. Okay, that's what we'll do  
14 then. We'll have the jury --

15 MR. DEAN: But can we also -- you're intending  
16 to read through the rebuttal portion.

17 THE COURT: I'm going to read the whole  
18 instruction.

19 MR. DEAN: Sixteen and seventeen?

20 THE COURT: Yup. Not the footnote, obviously,  
21 but --

22 MR. DEAN: Okay.

23 THE COURT: -- all of the text of 3.03, except  
24 I'm going to omit first amendment retaliation claim number  
25 one, plaintiff's conduct -- I'm not going to omit it, I'm

1 going to say it, but say that has been admitted. That  
2 element has been admitted by --

3 MR. DEAN: So it sounds like what they're hung  
4 up on is they didn't -- nobody can remember the exact  
5 elements because they don't have the instructions?

6 THE COURT: I'm guessing.

7 MR. DEAN: Okay. Would it be easier if we  
8 printed this off and gave it to them? Just that section,  
9 so they can take it back and nobody is trying to -- because  
10 they're not allowed to take notes, and I understand that,  
11 so we're relying again that everybody remembers it exactly  
12 the same way. Most trials I've done it's never been an  
13 issue to get the jury --

14 THE COURT: Right.

15 MR. DEAN: -- the instructions, and obviously,  
16 the most important one typically is the elements.

17 THE COURT: And I had intended to give them the  
18 instructions, but then I, you know, changed the  
19 instructions as I delivered them and so --

20 MR. DEAN: Well, the only one I -- on that  
21 section is the protected conduct, and I'm fine with that,  
22 because we've already -- the conduct was protected.

23 THE COURT: Yup.

24 MR. DEAN: Nobody is disputing that.

25 THE COURT: Well, how about this. I'll send

1           them -- I send them the instruction 3.03 attached to a note  
2           which says that element number one, you know, "Was  
3           plaintiff's conduct protected by the First Amendment has  
4           been conceded by the defendant, so it's -- you may consider  
5           it proven," or something like that.

6                     MR. DEAN: That's fine.

7                     THE COURT: Mr. Dykes-Bey, any objection to that  
8           procedure?

9                     MR. DYKES-BEY: No, your Honor.

10                    THE COURT: Okay, well, that's exactly what I'll  
11           do then. We won't bring the jury back in, I will do it by  
12           note and --

13                    MR. DYKES-BEY: Okay.

14                    THE COURT: -- a copy of the instruction. All  
15           right, we'll be adjourned.

16                             (11:53 a.m., court in recess.)

17                             (At 1:13 p.m., court reconvened.)

18                    THE COURT: All right, we have a third note.  
19           I'm going to read it first. Quote, "If we find in favor of  
20           plaintiff, how do we determine amount of damages? How much  
21           do FS employees earn on an hourly" an then the word  
22           "weekly" was written, but was crossed out, "basis,"  
23           question mark, closed quote. So what I'm proposing to do  
24           is to simply send them back the damage instructions, so  
25           that would be, again, could we get a copy of the

1 instructions for Mr. Dykes-Bey?

2 (Off the record discussion between the Court and  
3 employee.)

4 The -- in three -- CV-304A, damages reasonable,  
5 not speculative. I amended, when I read it, to exclude  
6 one, two, three, four. Mr. Dykes-Bey, we'll get you a copy  
7 of this. "Damages are not allowed as punishment and cannot  
8 be imposed or increased to penalize the defendant." I took  
9 that out because we have a separate punitive damage  
10 instruction. So I'm going to amend 304A by taking that  
11 sentence out, and then give them all of the damage  
12 instructions as a response. (Long pause.)

13 (Off the record discussion between the Court and  
14 employee.)

15 THE COURT: Yeah, uh-huh, good. You want to  
16 hand them out? So it would be from the instruction, pages  
17 21 -- page 21 being amended as I just described on the  
18 record. Page 22, which contains the nominal damage  
19 instruction, 23, which contains the punitive damage  
20 instruction, and 24, which contains CV 3.05A, the  
21 prejudgment interest instruction. Objections to that,  
22 Mr. Dykes-Bey?

23 MR. DYKES-BEY: No, your Honor.

24 THE COURT: Mr. Dean?

25 MR. DEAN: No, your Honor.

1 THE COURT: Okay. That's what we'll do then.  
2 We'll be adjourned again.

3 (At 1:17 p.m., court in recess.)

4 (At 1:39 p.m., court reconvened.)

5 THE COURT: Well, this is the note writing-est  
6 jury I've ever had.

7 MR. DEAN: Me, too.

8 THE COURT: Here, quote, "Do we have to," and  
9 then there's a mark, I don't know if it's supposed to be a  
10 letter, I'm not sure, "dollar amount" -- did we get -- did  
11 this get cut off? I wonder if that's what happened. Did  
12 this, the copy, the photocopy get cut off? I think it got  
13 cut off.

14 MR. DEAN: I might just raise this now, since  
15 there have been a number of notes. Are they being scanned  
16 so they can be part of the record?

17 THE COURT: Yup. Absolutely, yeah. They'll all  
18 be part of the record.

19 MR. DEAN: Thank you.

20 THE COURT: Yeah, it got cut off. Sorry. So  
21 here's, the note says, "Do we have to put a dollar amount  
22 down, question mark, or a phrase, 1,460 days of lost  
23 wages?"

24 MR. DEAN: I'm sorry, 14,000 days?

25 THE COURT: No, no. It's one thousand -- it's

1 written in numbers, 1460 days of lost wages. 1460 days of  
2 lost wages. My inclination would be, I mean the verdict  
3 sheet is set up with a dollar symbol in front of that line.  
4 So my inclination would be to say "a dollar amount."

5 MR. DEAN: So let me see if I understand this  
6 question right. They want to know whether they need to put  
7 a dollar amount or like 1460 days of lost wages, and then  
8 let us figure out what his wages were?

9 THE COURT: I think that is certainly a fair  
10 interpretation --

11 MR. DEAN: I mean.

12 THE COURT: -- or one interpretation of the  
13 note. Obviously, I don't know what's going on in their  
14 minds.

15 MR. DEAN: Obviously, from our standpoint, there  
16 was no evidence presented at trial as to what he was making  
17 or compensatory damages, and what the instruction in light  
18 of it saying that they can't speculate, it was plaintiff's  
19 burden to establish that. I would think if they came back  
20 with anything on that, that we would raise a posttrial  
21 motion or judgment notwithstanding the verdict and say,  
22 look, there's been no evidence presented of the dollar  
23 amount, so they can't put any amount. I know we can't  
24 instruct the jury on that, but I'm just --

25 THE COURT: No.

1 MR. DEAN: -- letting the Court know that's  
2 probably the direction I'm going at right now if they put  
3 anything down, because there's been no testimony at all.

4 THE COURT: All right, well, that's an issue for  
5 another day or another proceeding, in any event, so I'm  
6 going to answer it by saying, "The verdict form asks for a  
7 dollar amount, so put down a dollar amount." Any  
8 objections to that Mr. Dykes-Bey?

9 MR. DYKES-BEY: No, your Honor.

10 THE COURT: Objections to that --

11 MR. DEAN: Notwithstanding the objections I just  
12 said, no.

13 THE COURT: Okay. That's what we'll do.

14 (At 1:42 p.m., court in recess.)

15 (At 1:52 p.m., court reconvened.)

16 THE COURT: The jury sent us another note saying  
17 they have reached a verdict, so we'll bring them in now and  
18 take the verdict.

19 (At 1:53 p.m., jury enters courtroom.)

20 THE CLERK: Please be seated.

21 THE COURT: Ladies and gentlemen of the jury, I  
22 understand that you've reached a verdict. Would you please  
23 have your foreperson pass the verdict form to  
24 Ms. Carpenter.

25 Okay, the verdict form regarding plaintiff's



1 claim that defendant violated plaintiff's rights under the  
2 First Amendment, we find in favor of plaintiff. If your  
3 verdict was in favor of plaintiff, state the amount of  
4 damages sustained by plaintiff. Compensatory, \$5,500.  
5 Dated today and signed by the foreperson.

6 Ms. Carpenter, will you please poll the jury?  
7 The polling is a process by way we make sure that  
8 everybody, that this is everybody's verdict. So she'll be  
9 asking each of you separately questions.

10 THE CLERK: Juror in seat number one, Gary  
11 Roberts, was that and is that your verdict?

12 JUROR ROBERTS: It is.

13 THE CLERK: Juror in seat number two, Charles  
14 Moore, was that and is that your verdict?

15 JUROR MOORE: Yes, it is.

16 THE CLERK: Juror in seat number three,  
17 Alicia --

18 JUROR TUMELE: Tumele.

19 THE CLERK: -- Tumele, was that and is that your  
20 verdict?

21 JUROR TUMELE: Yes.

22 THE CLERK: Juror in seat number four, Debbie  
23 Kaldenberg, was that and is that your verdict?

24 JUROR KALDENBERG: Yes.

25 THE CLERK: Juror in seat number five, Madeline

1 Newell, was that and is that your verdict?

2 JUROR NEWELL: Yes.

3 THE CLERK: Juror in seat number six, Eliza  
4 Owens, was that and is that your verdict?

5 JUROR OWENS: Yes.

6 THE CLERK: Juror in seat number seven, Denise  
7 Cripps, was that and is that your verdict?

8 JUROR CRIPPS: Yes.

9 THE CLERK: Juror in seat number eight, Destiny  
10 Totten, was that and is that your verdict?

11 JUROR TOTTEN: Yes.

12 THE COURT: All right, ladies and gentlemen,  
13 well, thank you so much for your service. I know I speak  
14 on behalf of the parties, certainly on behalf of the Court,  
15 and really, on behalf of the citizens of West Michigan. I  
16 want to thank you for spending the time doing a civic duty  
17 that has tremendous benefit, you know, to our community. I  
18 know it's a disruption and, you know, time away from work  
19 and school and family and other things, but we really,  
20 really appreciate it. And it's folks like you that make  
21 the whole legal system work. So thank you so much.

22 You're discharged now. You can talk about the  
23 case if you want to. You don't have to, but you can, and  
24 certainly go home and tell your family or whoever anything  
25 you want to about the case at this point.

1                   We're going to have you go back into the jury  
2                   room, collect your devices. If you don't mind waiting, I'd  
3                   like to talk to you for a minute, just see what your  
4                   experience was like. I'll have to talk to the parties for  
5                   a couple of minutes, but I'll be back there very -- very  
6                   quickly. We'll be adjourned.

7                   (At 1:56 p.m., jury exits courtroom.)

8                   THE COURT: All right, anything else we should  
9                   take up at this time?

10                  MR. DEAN: Well, in light of what just happened,  
11                  that the only order is compensatory, I think we probably  
12                  will file a posttrial motion outlining what I just said.  
13                  Would you rather us brief it out or --

14                  THE COURT: Uh-huh. Yes, please.

15                  MR. DEAN: Okay. Absolutely.

16                  THE COURT: To the extent you'll need a  
17                  transcript to do whatever it is you're intending to do,  
18                  you'll have to order it. You know, it will have -- all I'm  
19                  saying is give it some time.

20                  MR. DEAN: Sure. Sure.

21                  THE COURT: And if the, you know, getting the  
22                  transcript becomes a problem time-wise, you know, file a  
23                  motion --

24                  MR. DEAN: Okay.

25                  THE COURT: -- and, you know, I'll give you some

1 relief. Because --

2 MR. DEAN: Okay.

3 THE COURT: -- you know, since we don't have a  
4 court reporter here, it's harder for us to get the --

5 MR. DEAN: I totally understand.

6 THE COURT: -- transcripts prepared.

7 MR. DEAN: Sure. Okay.

8 THE COURT: All right.

9 MR. DEAN: Thank you.

10 THE COURT: Mr. Dykes-Bey, anything from you,  
11 sir?

12 MR. DYKES-BEY: No, sir.

13 THE COURT: All right. Well, I just want to  
14 say, I'm going to come down and shake the hands of both  
15 sides. I think you both did a fine job, you know. I think  
16 the jury took its responsibilities very seriously. They  
17 certainly were back there for a long time and they were  
18 thinking about it, sending us notes about it, so --

19 MR. DYKES-BEY: Yeah.

20 THE COURT: -- I think the process worked. And  
21 I appreciate, Mr. Dykes-Bey, as I said from the beginning,  
22 you're a perfect gentleman.

23 MR. DYKES-BEY: Thank you, sir.

24 THE COURT: I really appreciate that. You did  
25 yourself proud, and you did other inmates in your situation

1 proud as well, so.

2 MR. DYKES-BEY: Thank you, your Honor.

3 (At 1:58 p.m., proceedings concluded.)

4 -oo0oo-

CERTIFICATE OF REPORTER

I, Bonnie L. Rozema, CER, do hereby certify that the foregoing transcript consisting of 62 pages, is a complete, true, and accurate transcript of the proceedings and testimony, to the best of my ability from the audio recording, held in this case on August 23, 2018.

I do further certify that I prepared the foregoing transcript.

/s/ Bonnie L. Rozema

Bonnie L. Rozema, CER-5571  
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Notary Public in and for  
Kent County, Michigan  
My commission expires:  
March 26, 2019  
Acting in the County of Kent